William Singam a/l Raja Singam (suing as the Public Officer of Pertubuhan Persaudaraan Kristian Thaveethin Kudaram, Ipoh Perak) v Meeriam Rosaline a/p Edward Paul & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22–61 OF 2004
BALIA YUSOF J
18 APRIL 2007

Civil Procedure — Striking out — Application for — Application to strike out plaintiff's claims — Whether claim on face of it obviously unsustainable — Whether pleadings disclosed some cause of action or raised some question fit to be decided by judge — Whether action filed by plaintiff was scandalous, frivolous or vexatious — Delay in filing of application — Defendants entered unconditional appearance — Whether deprived of right to invoke O 18 r 19 — Principles upon which court acts in exercising its power — Rules of the High Court 1980 O 18 r 19(1)(b)

Civil Procedure — Summary application — Rules of the High Court 1980 O 14A — Question of law — Determination of — Whether suitable case to be summarily determined under O 14A — Power of court to decide summarily — Whether by answering question of law posed will finally determine entire cause or matter or any claim or issue therein

On 16 July 1999, the first and second defendants had, as trustees of Pertubuhan Persaudaraan Kristian Thaveethin Kudaram, Ipoh Perak ('Persatuan'), entered into an agreement with Kinta Properties Sdn Bhd to purchase a parcel of land in the district of Kinta, Perak for a sum of RM2,300,000 only. For this transaction, a sum of RM2,100,000 was given to the Persatuan as a friendly loan by one Tan Sri Hari Narayanan by using a company known as Taipan Consolidated Projects Sdn Bhd ('the company') as a vehicle. The said friendly loan was to be repaid once the first and second defendants secured a loan from a commercial bank within a reasonable period of time. By a trust deed dated 12 October 1999, the first and second defendants were named as trustees of the Persatuan and the said land was registered in their names as trustees. By November 2000, Tan Sri Narayanan was anxious to obtain the repayment of the said friendly loan while the first and second defendants were still unable to secure a loan from a commercial bank. Thus, via a conditional agreement dated 28 May 2003 between the first and second defendants and the fourth defendant, the said land was sold to the

A fourth defendant for RM2,099,950. It was a condition precedent of the agreement that the first and second defendants must first obtain an order from the High Court approving the transfer of the said land to the fourth defendant. In compliance with the term of the conditional agreement, the first and second defendants had obtained an order from High Court in Ipoh
B approving the sale of the land to the fourth defendant. The fourth defendant was required to pay the purchase price to the company as a repayment in full of the friendly loan granted by Tan Sri Narayanan to the Persatuan. The plaintiff, a public officer of the Persatuan, alleged, inter alia, that there was a collusion and/or conspiracy among the defendants in effecting the final
C transfer of the land to the fourth defendant. The plaintiff also alleged that the first, second and third defendants had colluded and conspired in obtaining the court order approving the sale of the land to the fourth defendant. The plaintiff also challenged the order of the High Court approving the sale of the said land to the fourth defendant. The first and the third defendants however,
D denied the allegations and the claims by the plaintiff and instead countered that there was a conspiracy between the plaintiff and the second defendant relating to the land transaction. The fourth defendant took the stand that they were bona fide purchasers of the said land and in turn filed a counterclaim for the possession of the said land and for damages and costs.
E The second defendant admitted the claims of the plaintiff and alleged that the first, third and fourth defendants had colluded with a solicitor's firm in effecting the final transfer of the said land to the fourth defendant. The second defendant further alleged that there were irregularities in the court order approving the sale of the said land to the fourth defendant which
F according to him was obtained through collusion and misrepresentation by the first, third and fourth defendants. Enclosure 10 was an application by the first, third and fourth defendants to strike out the writ of summons dated 5 April 2004. Meanwhile, encl 32 was an application by the fourth defendant for the determination of a question of law under O 14A of the Rules of the
G High Court 1980 ('RHC'). At the same time the fourth defendant was also seeking an order that the court under its inherent jurisdiction stays all proceedings in this matter pending the determination of this question of law. Counsel for the plaintiff resisted the encl 10 application and argued that there was a delay in the filing of the application to strike out the plaintiff's claim.
H Further, the defendants having entered unconditional appearance had deprived themselves of the right to invoke O 18 r 19 of the RHC.

I **Held**, dismissing the applications with costs:

(1) The filing of an unconditional appearance did not preclude a defendant from making an application under O 18 r 19. The words 'at any stage of the proceedings' must be given its full and ordinary meaning. Therefore, the objection raised by the plaintiff's counsel on the filing of

the application after an unconditional appearance had been filed was untenable. Having considered the whole facts and circumstances of the case, the application was lacking in merits and it had not been sufficiently demonstrated that the plaintiff's claims was scandalous, frivolous, and vexatious (see paras 13 & 15).

(2) Summary process under O 18 r 19(1) can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. In order to see whether a party had a cause of action or a defence, the court was not obliged to go on a minute examination of the documents and facts of the case. So long as the pleadings disclosed some cause of action or has raised some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for it to be struck out (see para 9).

(3) The facts and circumstances of this case certainly did not fit into the category of cases which can be dealt with summarily under O 18 r 19. The pleadings in the instant case disclosed many vexed questions of law on fraud, breach of trust, on the subject matter of injunctions, declarations, impeachment of previous court proceedings and on the issue of indefeasibility of title under the National Land Code. There were far too many issues that had been raised and required full ventilation (see para 12).

(4) The issue of whether or not the fourth defendant was a bona fide purchaser was seriously disputed in the instant case. This was reflected by the number of affidavits filed by the parties in this suit. A factual question such as this should be determined by way of a full trial and should never be summarily determined by way of an O 14A procedure. By answering the question of law posed by the fourth defendant, there could not be a final determination of the entire cause or matter before this court (see paras 19 & 21).

[Bahasa Malaysia summary

Pada 16 Julai 1999, defendan pertama dan kedua, sebagai pemegang amanah kepada Pertubuhan Persaudaraan Kristian Thaveethin Kudaram, Ipoh Perak ('Persatuan') telah memasuki satu perjanjian dengan Kinta Properties Sdn Bhd untuk membeli sebidang tanah di daerah Kinta, Perak yang berharga RM2,300,000 sahaja. Bagi transaksi ini, sejumlah RM2,100,000 telah diberikan kepada persatuan sebagai pinjaman persahabatan oleh Tan Sri Hari Narayanan menggunakan sebuah syarikat yang dikenali sebagai Taipan Consolidated Projects Sdn Bhd ('syarikat tersebut') sebagai perantara. Pinjaman persahabatan tersebut perlu dibayar semula apabila defendan pertama dan kedua memperolehi pinjaman daripada bank komersial dalam tempoh masa yang munasabah. Berdasarkan surat ikatan amanah yang

A bertarikh 12 Oktober 1999, defendan pertama dan kedua telah dinamakan sebagai pemegang amanah Persatuan dan tanah tersebut telah didaftarkan di atas nama mereka sebagai pemegang amanah. Pada November 2000, Tan Sri Narayanan begitu berhasrat untuk mendapatkan bayaran balik pinjaman tersebut, sedangkan defendan pertama dan kedua masih belum mampu
B mendapatkan pinjaman daripada bank komersial. Oleh itu, melalui perjanjian bersyarat yang bertarikh 28 Mei 2003 di antara defendan pertama, kedua dan keempat, tanah tersebut telah dijual kepada defendan keempat pada harga RM2,099,950. Ianya adalah syarat terdahulu perjanjian bahawa defendan pertama dan kedua mestilah pertamanya mendapatkan perintah
C daripada Mahkamah Tinggi yang meluluskan pertukaran tanah tersebut kepada defendan keempat. Dalam memenuhi terma perjanjian bersyarat tersebut, defendan pertama dan kedua telah memperoleh satu perintah daripada Mahkamah Tinggi di Ipoh yang meluluskan penjualan tanah tersebut kepada defendan keempat. Defendan keempat dikehendaki
D membayar harga belian kepada syarikat tersebut sebagai bayaran balik secara penuh pinjaman persahabatan yang diberikan oleh Tan Sri Narayanan kepada Persatuan. Plaintif, pegawai awam persatuan mendakwa, antara lain, bahawa terdapat pakatan sulit dan/atau konspirasi di kalangan defendan-defendan dalam melaksanakan pertukaran akhir tanah tersebut kepada defendan
E keempat. Plaintif juga mendakwa bahawa defendan pertama, kedua dan ketiga mempunyai pakatan sulit dan berkonspirasi di dalam mendapatkan perintah mahkamah yang meluluskan penjualan tanah tersebut kepada defendan keempat. Plaintif juga mencabar perintah Mahkamah Tinggi yang meluluskan penjualan tanah tersebut kepada defendan keempat. Walau
F bagaimanapun defendan pertama dan ketiga telah menafikan dakwaan dan tuntutan plaintif dan sebaliknya membalas bahawa terdapat konspirasi di antara plaintif dan defendan kedua berkenaan dengan transaksi tanah tersebut. Defendan keempat mengambil pendirian bahawa mereka adalah pembeli bona fide tanah tersebut dan telah memfailkan tuntutan balas untuk
G milikan tanah tersebut dan ganti rugi serta kos. Defendan kedua mengakui tuntutan plaintif dan mendakwa bahawa, defendan pertama, ketiga dan keempat mempunyai pakatan sulit dengan firma guaman dalam melaksanakan pertukaran terakhir tanah tersebut kepada defendan keempat. Selanjutnya, defendan kedua mendakwa bahawa terdapat kejanggalan
H di dalam perintah mahkamah yang meluluskan penjualan tanah tersebut kepada defendan keempat, yang mana menurutnya telah diperoleh secara pakatan sulit dan salah nyata oleh defendan pertama, ketiga dan keempat. Lampiran 10 adalah permohonan defendan pertama, ketiga dan keempat untuk membatalkan writ saman yang bertarikh 5 April 2004. Sementara itu,
I lampiran 32 adalah permohonan oleh defendan keempat untuk memutuskan persoalan undang-undang di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Pada masa yang sama, defendan keempat juga memohon satu perintah bahawa mahkamah di bawah bidang kuasa sedia ada menggantung kesemua prosiding di dalam perkara ini sementara mahkamah

memutuskan persoalan perundangan. Peguamcara plaintif menentang permohonan lampiran 10 dan menyatakan bahawa terdapat kelewatan di dalam memfailkan permohonan untuk pembatalan tuntutan plaintif. Selanjutnya, defendan-defendan yang telah memasukkan kehadiran tidak bersyarat telah dinafikan hak untuk menggunakan A 18 k 19 KMT.

Diputuskan, menolak kedua-dua permohonan dengan kos:

(1) Pemfailan kehadiran tidak bersyarat tidak menghalang defendan daripada membuat permohonan di bawah A 18 k 19. Perkataan 'ketika mana-mana peringkat prosiding' mestilah diberikan maksud yang penuh dan biasa. Oleh itu, bantahan yang dibangkitkan oleh peguamcara yang bijaksana berkenaan dengan pemfailan permohonan selepas kehadiran tidak bersyarat difailkan adalah tidak dapat bertahan. Setelah mempertimbangkan keseluruhan fakta dan keadaan kes, permohonan tidak mempunyai merit dan ia tidak dengan secukupnya ditunjukkan bahawa tuntutan plaintif adalah bersifat skandal, remeh dan menyusahkan (lihat perenggan 13 &15).

(2) Proses terus di bawah A 18 k 19(1) KMT hanya boleh dipakai apabila ianya boleh dilihat bahawa tuntutan atau jawapannya adalah 'begitu jelas tidak dapat dikekalkan'. Untuk melihat sama ada satu-satu pihak mempunyai kausa tindakan atau pembelaan, mahkamah tidak perlu untuk memeriksa secara terperinci dokumen dan fakta di dalam kes ini. Selagi mana pliding-pliding mendedahkan beberapa kausa tindakan atau telah membangkitkan beberapa persoalan, sesuai untuk diputuskan oleh hakim, fakta semata-mata bahawa kes adalah lemah dan berkemungkinan tidak berjaya ketika perbicaraan bukanlah alasan untuknya dibatalkan (lihat perenggan 9).

(3) Fakta dan keadaan kes ini pastinya tidak sesuai di dalam kategori kes yang boleh diuruskan secara terus di bawah A 18 k 19. Pliding-pliding di dalam kes ini mendedahkan banyak persoalan perundangan yang susah berkenaan dengan penipuan, pecah amanah, terhadap perkara injunksi, deklarasi, pencabaran prosiding mahkamah yang lalu dan isu hak milik tak boleh sangkal di bawah Kanun Tanah Negara. Terdapat begitu banyak isu yang telah ditimbulkan dan memerlukan penumpuan sepenuhnya (lihat perenggan 12).

(4) Isu sama ada atau tidak defendan keempat adalah pembeli bona fide adalah dipertikaikan dengan serius di dalam kes ini. Ini tergambar oleh beberapa afidavit yang difailkan oleh pihak-pihak dalam guaman ini. Satu persoalan fakta seperti ini perlu diputuskan secara perbicaraan penuh dan tidak seharusnya diputuskan secara terus melalui prosedur A 14A. Dengan menjawab persoalan undang-undang yang

dikemukakan oleh defendan keempat, tidak terdapat penentuan terakhir terhadap keseluruhan kausa atau perkara di hadapan mahkamah ini (lihat perenggan 19 & 21).]

Notes

For a case on application for striking out, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6695.

For a case on Rules of the High Court 1980 O 14A, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6823.

Cases referred to

Adorna Properties Sdn Bhd v Bonsoom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241, FC (refd)

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Ho Sdn Bhd & Ors [1995] MLJ 241, SC (refd)

Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136; [2007] 4 AMR 546, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

C Jegathesan (practising as M/S C Jegathesan) v Ahmad bin Hamzah & Anor [2000] MLJU 637; [2001] 1 CLJ 339, HC (folld)

Dato' Hari Menon @ Dato' T Puraharan a/l CP Ramakrishnan (suing ss legal representative of DYMM Tuanku Ja'afar ibni almarhum Tuanku Abdul Rahman, Yang Di Pertuan Besar Negeri Sembilan Darul Khusus) v Texas Encore LLC & Ors [2005] 4 MLJ 506; [2003] 2 CLJ 688, HC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2008] 2 MLJ 812; [2007] 6 CLJ 741, CA (refd)

Mohamed v Alaga & Co (a firm) [1998] 2 All ER 720, Ch D (refd)

Muhamad Zain bin Sidek v Suruhanjaya Perkhidmatan Awam Malaysia [2002] MLJU 779, HC (refd)

N Carrupaiya v MBf Property Services Sdn Bhd & Anor [2000] 4 MLJ 389, HC (folld)

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (refd)

Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd [1987] 1 MLJ 413, HC (folld)

Vernazza, Re [1959] 2 All ER 200, QBD (refd)

Legislation referred to

Internal Security Act 1960

National Land Code s 340

Rules of the High Court 1980 O 14, O 14A, O 18 r 19(1)(b), O 92 r 4

M Manoharan (M Manoharan & Co) for the plaintiff.

Zaki (Sossay Nathan with him) (Shahrizat Rashid & Lee) for the first, third and fourth defendants.

R Kengadharan (R Prabhakaran with him) (R Kengadaran & Co) for the second defendant.

Balia Yusof bin Haji Wahi, J:

[1] Enclosure 10 is an application by the first, third and fourth defendants under O 18 r 19(1)(b) of the Rules of the High Court 1980 ('RHC') to strike out the writ of summons dated 5 April 2004. Enclosure 32 is an application by the fourth defendant for the determination of a question of law under O 14A of the same Rules. At the same time the fourth defendant is also seeking for an order that this court under its inherent jurisdiction under O 92 r 4 stays all proceedings in this matter pending the determination of this question of law.

[2] At the outset of the hearing, all parties in the suit agreed that both encll 10 and 32 be heard together by the judge. This is despite the fact that the application in encl 10 was fixed before the registrar. Perhaps it is also pertinent to mention that when encl 32 first came up for hearing, the plaintiff filed an application for extension of time to file affidavit in reply via encl 54 and there was a counter affidavit by the fourth defendant in encl 61. Upon hearing arguments from both the fourth defendant and the plaintiff, I allowed the plaintiff's application in encl 54 with no order as to costs. At the said hearing, the second defendant informed the court that he wished to file an affidavit to oppose the fourth defendant's application in encl 32 and upon the plaintiff, the first, third and fourth defendants raising no objection, the court allowed the second defendant to file an affidavit in reply to encl 32. At the same time the second defendant has also filed encl 28 seeking an order for extension of time to file affidavit in reply to the application in encl 10. Again, the plaintiff, the first, third and fourth defendant's register no objection and accordingly the court allowed the application in encl 28 with no order as to costs. It was upon this scenario that all parties to this suit agree that both encls 10 and 32 be heard together by the judge.

[3] For a better appreciation of the plaintiff's application in encl 10 and the fourth defendant's application in encl 32, it is worthwhile to set out the facts of the case and detailing out the dispute among the parties. A narration of the facts of this case becomes more relevant upon considering the fact that in his statement of claim the plaintiff is claiming no less that twenty reliefs from this court. I choose not to set out what those twenty prayers are for the very simple reason that, as it will be shown later, most of the prayers are overlapping and perhaps also repetitive in nature.

THE FACTS

[4] On 16 July 1999, the first and second defendants as trustees of

Pertubuhan Persaudaraan Kristian Thaveethin Kudaram, Ipoh Perak ('Persatuan') entered into an agreement with Kinta Properties Sdn Bhd, agreeing to buy a parcel of land known as HS(D) ka 744/76 Lot No 71560, Tempat Ulu Kinta, Mukim Ulu Kinta, Daerah Kinta, Perak for a sum of RM2,300,000 only. For that transaction, a sum of RM2,100,000 was given to the Persatuan as a friendly loan by one Tan Sri Hari Narayanan a/l Govindasamy by using a company known as Taipan Cosolidated Projects Sdn Bhd as a vehicle. There was a clear understanding between the parties that the said friendly loan was to be repaid once a loan from a commercial bank was obtained by the first and second defendants within a reasonable period of time. By a trust deed dated 12 October 1999 the first and second defendants were named as trustees of the Persatuan. The land was registered in the name of the first and second defendants as trustees of the Persatuan. By November 2000, Tan Sri Narayanan had, in the words of the fourth defendant's counsel become anxious to obtain repayment of the said friendly loan while the first and second defendants were still unable to obtain a loan from a commercial bank. Thus, via a conditional agreement dated 28 May 2003 between the first and second defendants and the fourth defendant, the said land was sold to the fourth defendant for RM2,099,950. It was a condition precedent of the agreement that the first and second defendants must first obtain an order from the High Court approving the transfer of the said land to the fourth defendant.

[5] In compliance with the term of the conditional agreement, the first and second defendants through an Originating Summons No 24–549 of 2003 obtained from the Ipoh High Court an order approving the sale of the said land to the fourth defendant. According to the term of the agreement, the fourth defendant shall pay the purchase price to Taipan Consolidated Projects Sdn Bhd as a repayment in full of the friendly loan graned by Tan Sri Narayanan to the Persatuan.

THE CLAIM

[6] The plaintiff is suing the defendants in his capacity as a public officer of the Persatuan. The plaintiff alleges that there is a collusion and/or conspiracy among the defendants in effecting the final transfer of the land to the fourth defendant. Against the first, second and third defendants, the plaintiff alleges that they have colluded and conspired in obtaining the court order approving the sale of the land to the fourth defendant. There are further allegations of fraud against the first and second defendants in obtaining the said court order and also an allegation of breach of trust on the part of the first, second and third defendants. The plaintiff is also challenging the order of the High Court dated 28 July 2003 approving the sale of the said land to the fourth defendant. The plaintiff alleges that the consent of the members

of the Persatuan for the sale of the said land was obtained after the sale and purchase agreement was signed. The plaintiff is challenging the validity of the consent which was obtained through an EGM held after the signing of the sale and purchase agreement. Among the reliefs sought by the plaintiff in this action are:

(a) a declaration on the court order dated 28 July 2003 approving the sale of the land;

(b) injunction against the fourth defendant from further dealing with the land;

(c) reinstatement of the Ipoh High Court Originating Summons No 24–259 of 2003 and a rehearing of the same;

(d) an order for the plaintiff to intervene in the said originating summons;

(e) a declaration in respect of the transfer of the said land to the fourth defendant;

(f) a declaration that the first and fourth defendants has committed breach of trust in respect of the trust deed;

(g) the removal of a private caveat lodged by the second defendant on the said land;

(h) general and exemplary damages; and

(i) interests and costs.

[7] The defendants has filed their respective defences. The first and third defendants deny the allegations and the claims by the plaintiff and instead countered that there is a conspiracy between the plaintiff and the second defendant relating to the land transaction. The fourth defendant takes the stand that they are a bona fide purchaser of the said land and in turn filed a counterclaim for the possession of the said land and for damages and costs. Interestingly, the second defendant admits the claims of the plaintiff and alleges that the first, third and fourth defendants has colluded with a solicitor's firm in effecting the final transfer of the said land to the fourth defendant. The second defendant further alleges that there are irregularities in the court order approving the sale of the said land to the fourth defendant which according to him was obtained through collusion and misrepresentation by the first, third and fourth defendants.

THE LAW

[8] In dealing with the application to strike out the plaintiff's claim under O 18 r 19 of the Rules of the High Court 1980, there are no less than eight competing affidavits filed by the parties herein. All these eight affidavits

contain a multitude of issues and facts relating to the allegations of fraud, collusion and misrepresentation relating to the transfer of the said land to the fourth defendant and the acts of the first and second defendants as trustees of the Persatuan in obtaining the court order approving the sale of the same to the fourth defendant. A perusal of the facts and issues transparent from the pleadings before the court clearly indicates that it encompasses not only the on issue of fraud against the defendants but it also brings to light the issue of the resurrection of a matter which has been dealt with by this court in another case namely, the proceedings relating to the application for the approval of the sale of the land to the fourth defendant. Again, there is also the issue of fraudulent misrepresentation by the trustees of the Persatuan and the bona fides of the transaction between the fourth defendant and the trustees of the Persatuan. These are among the main issues that has been brought up to light and seeking for determination. With this background can one safely say that this is a plain and obvious case?

[9] It has always been said that it is only in plain and obvious cases that recourse should be had to the summary process under O 18 r 19(1) and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. In order to see whether a party has a cause of action or a defence, the court is not obliged to go on a minute examination of the documents and facts of the case. So long as the pleadings disclosed some cause of action or has raised some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for it to be struck out. This principle has been settled, and reference must be made to the celebrated case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 where Mohamed Dzaiddin SCJ delivering the judgment of the Supreme Court stated at p 43:

> Secondly, based on the competing affidavits of the parties, can this court exercise its power under the said order or under its inherent jurisdiction to strike out the same pleadings on the grounds that they are frivolous or vexatious or may prejudice, embarrass or delay the fair trial of the action or that these pleadings are otherwise an abuse of the process of the court under r 19(1) (b), (c) or (d) of O 18?
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> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors*). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3

(which is in pari material with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[10] The application to strike out the plaintiff's claims is premised on the ground that the action filed by the plaintiff is scandalous, frivolous or vexatious. I do not deem it necessary to tabulate what scandalous, frivolous or vexatious means in the circumstances of this case but suffice for me to ask the question whether the plaintiff's claim is without legal basis or legal merit or that it is without probable cause or excuse or further still, is it a matter which is both grossly disgraceful or irrelevant to the action? I come to this approach after a close perusal of the pleadings herein and also upon considering the whole history of the matter before me as presented in the volumes of affidavits filed by the parties. In *Re Vernazza* [1959] 2 All ER 200 the Queen's Bench Division held that to determine whether a proceeding is vexatious, the court must look at the whole history of the matter and not solely at the pleadings. At p 202 of the report, Lord Parker CJ held as follows:

> In considering whether any proceedings are vexatious, one is entitled to and must look at the whole history of the matter and it is not determined by whether the pleading discloses a form of action. Indeed that is the principle applied under the rules of court when application is made to strike out a pleading. Though the pleading may be in order, the court in its inherent jurisdiction is entitled to look at affidavits as to the history of the matter, and if in the light of the history the action is vexatious, the matter can be struck out and the action dismissed.

[11] From the facts presented, obviously this case has a chequered history and merits further scrutiny and a full ventilation of the issues raised.

[12] In my considered view too, the facts and circumstances of this case certainly do not fit into the type of cases envisaged by the test set out in the *Bandar Builder*'s case for the category of cases which can be dealt with summarily under O 18 r 19. The pleadings in the instant case disclose many vexed questions of law on fraud, breach of trust, on the subject matter of injunctions, declarations, impeachment of previous court proceedings and on the issue of indefeasibility of title under the National Land Code. I find there are far too many issues that has been raised and requires full ventilation. In the same breadth, I am further guided by the principle that binds judges in exercising their power of striking out cases as laid down in the case of *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413. In this respect I can do no better than reproducing what His Lordship Edgar Joseph Jr J (as he then was) stated at p 418 of the report which says:

In considering the application now before me, which as I have said, is to strike out the plaintiffs' writ of summons and indorsement of claim as being, inter alia, frivolous, vexatious and an abuse of the process of the court, I had kept in the forefront of my mind, the well-settled principle that it is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases (per Lord Herschell in *Lawrance v Lord Norreys*). It follows, that an order will be made only in cases when it is obvious that the claim is devoid of all merit or cannot possible succeed — *Willis v Earl Beauchamp*.

[13] Mr M Manoharan, counsel for the plaintiff, resisted the application and argued that there is a delay in the filing of the application to strike out the plaintiff's claim. In his submission he pointed out that the writ was filed on 5 April 2004 and the application in encl 10 was filed on 10 July 2004. Unconditional appearance was filed on 28 April 2004, 5 May 2004 and 27 May 2004 by the first and third defendants, the fourth defendant and the second defendant respectively. Counsel takes the stand that on the authority of *Dato' Hari Menon @ Dato' T Puraharan a/l CP Ramakrishnan (suing as legal representative of DYMM Tuanku Ja'afar ibni almarhum Tuanku Abdul Rahman, Yang Di Pertuan Besar Negeri Sembilan Darul Khusus) v Texas Encore LLC & Ors* [2005] 4 MLJ 506; [2003] 2 CLJ 688, the defendants having entered unconditional appearance had deprived themselves of the right to invoke O 18 r 19. At the same time a passage from the judgment of the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Ho Sdn Bhd & Ors* [1995] MLJ 241 that the filing of an unconditional appearance had deprived the defendant of the right to invoke O 18 r 19 was also relied upon by counsel in support of his submission. These submissions do not find favour with me. The issue of filing of unconditional appearance in O 18 r 19 cases has been dealt with by a number of my other brother judges. In *N Carrupaiya v MBf Property Services Sdn Bhd & Anor* [2000] 4 MLJ 389 Mohd Hishamuddin J (now JCA) held that the filing of an unconditional appearance does not prelude a defendant from making an application under O 18 r 19. Likewise Muhamad Kamil Awang J expresses a similar view in *C Jegathesan (practising as M/S C Jegathesan) v Ahmad bin Hamzah & Anor* [2000] MLJU 637; [2001] 1 CLJ 339. In my view the words 'at any stage of the proceedings' must be given its full and ordinary meaning. I am in full agreement with the views previously expressed by my two learned brothers. At the same time I also share the same observation made by Mohd Hishamuddin J on the *Alor Janggus* case wherein His Lordship stated that the remark by Jemuri Serjan CJ (Borneo) was merely an obiter dicta, for, in that case, the issue of whether or not the respondents could file an O 18 r 19 application was not an issue before the Supreme Court. A mere obiter dicta of a higher court is not binding upon this court.

[14] Before concluding on this issue, I think it would serve as a good guide to refer to the judgment of Suriyadi J (now JCA) on the construction of the

rule. In *Norwest Holdings Sdn Bhd v Muhibbah Engineering (M) Bhd* [2004] 4 MLJ 481; [2004] 7 CLJ 400, the learned judge stated at p 486 (MLJ); pp 405–406 (CLJ):

> A brief sight of O 18 r 19 of the RHC 1980, certainly does not indicate anywhere the mandatory requirement that a striking out action application must be undertaken within a specific time frame (*Doree Industries (M) Sdn & Ors v Sri Ram & Co (sued as a firm) & Ors* [2001] 4 CLJ 446; *N Carrupaiya v MBf Property Services Sdn Bhd & Anor* [2000] 4 CLJ 116; *Tucker v Collinson* 3A WR 354; *Mallal's Supreme Court Practice*, 2nd Ed, p 226). The provisions in no uncertain term states that the court may at any stage of the proceedings, order to be struck out, on the ground that the writ or any pleading discloses no reasonable cause of action or defence, as the case may be, or it is scandalous, frivolous or vexatious, or it may prejudice, embarrass or delay the fair trial of the action, or it is otherwise an abuse of the process of the court (by analogy see *TR Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd* [1985] 2 MLJ 45; *Tan Lay Soon v Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, intervener* [1992] 4 CLJ 1922; [1992] 3 CLJ (Rep) 657). Nothing is stated in it by whatever form that once pleadings are closed all striking out actions thereafter will be barred.
>
> The above argument applies equally to situation where an applicant had already filed an unconditional appearance. Nothing is provided for under O 18 r 19, stating that to strike out the writ a conditional appearance must be filed first, or that once an unconditional appearance has been filed, an interested person is precluded from making an application of striking out on the given grounds (*N Carrupaiya v MBf Property Services Sdn Bhd & Anor*; *Leong Peng Kheong & Anor v Dawntree Properties Sdn Bhd* [2002] 1 CLJ 602; *Bank Bumiputra (M) Bhd & Anor v Lorraine Esme Osman* [1987] 2 MLJ 633; *Jamir Hassan v Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773).

[15] I have not a slightest doubt about the correctness of the above passages and I humbly agree with the views expressed therein. In the circumstances, I hold that the objections raised by learned counsel on the filing of the application after an unconditional appearance has been filed in untenable. The defendant's application in encl 10 is permissible. However, having considered the whole facts and circumstances of the case, it is my finding that the application is lacking in merits and it has not been sufficiently demonstrated to this court that the plaintiff's claim is scandalous, frivolous or vexatious. In the upshot, encl 10 is hereby dismissed with costs.

[16] I shall now turn to encl 32 which is an application under O 14A of the Rules of the High Court 1980. It is the fourth defendant's application to determine a question of law which has been framed in the application as follows:

> Sama ada menurut provisi-provisi s 340 Kanun Tanah Negara 1965 defendant keempat adalah di sisi undang-undang seorang pembeli yang telah 'dengan niat mulia dan dengan nilai balasan' memperolehi hakmilik kepada tanah yang dikenali

A sebagai 'HS(D) ka 774/76, Lot No 71560, Tempat Ulu Kinta, Mukim Ulu Kinta, Daerah Kinta Negeri Perak Darul Ridzuan' selepas ini dipanggil 'tanah tersebut' dan yang mana tanah tersebut adalah hakmilik yang tidak boleh disangkal.

B **[17]** The grounds put forth by the fourth defendant in support of its application is simply that it has an indefeasible title to the land by virtue of the provisions of s 340 of the National Land Code and that the plaintiff has failed to show any fault on the part of the fourth defendant. In its affidavit in support of the application the fourth defendant through one of its C directors averred that, by a sale and purchase agreement dated 16 July 1999 the first and second defendants as trustees of the Persatuan bought a piece of land described as 'HS(D) ka 744/76 Lot No 71560, Tempat Ulu Kinta, Mukim Hulu Kinta, Daerah Kinta, Negeri Perak Darul Ridzuan'. At this stage I do not think it is necessary for me to state further the contents of the D fourth defendant's affidavit because to do so will be a repetition of the narration of facts of the case which I have tabulated in the earlier part of this judgment. Beside giving the facts of the case, there is nothing material in the said affidavit in support (encl 33) except that at the end of the same, the deponent avers that the fourth defendant has not committed any offence and E that the plaintiff has failed to state what offence the fourth defendant has committed. Other than that the deponent merely went on to state that in the circumstances, he believes that there is no necessity for a full trial in respect of the plaintiff's case against the fourth defendant and likewise the fourth defendant's counterclaim against the plaintiff.

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[18] In response to the affidavit is reply filed by the other parties in the suit, the fourth defendant also relied on four other affidavits namely, encll 71, 72, 73 and 74 which focused on the allegation of fraud and collusion in respect of the sale of the land to the fourth defendant. These affidavits among others, G contain the averments of solicitors involved in the transaction regarding the sale of the said land to the fourth defendant and the proceeding relating to the application for a court order to sanction the sale of the said land by the first and second defendants as trustees of the Persatuan to the fourth defendant.

H

[19] It is trite that for an application under O 14A of the RHC to succeed, there should not be any dispute by the parties as to the relevant facts or that the court upon scrutinising the pleadings comes to the conclusion that the material facts are not in dispute (see *Petroleum Nasional Bhd v Kerajaan Negeri* I *Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337, *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812; [2007] 6 CLJ 741). The issue of whether or not the fourth defendant is a bona fide purchaser is seriously disputed in the instant case. This is reflected by the number of affidavits filed by the parties in this suit. A factual question such as this should be

determined by way of a full trial and should never be summarily determined by way of an O 14A procedure. As succinctly put by Lightman J in *Mohamed v Alaga & Co (a firm)* [1998] 2 All ER 720:

> ... Under O 14A, the court can decide any question of law at any stage of the proceedings if that question is suitable for determination without a full trial of the action and such determination will finally determine the entire action or any claim or issue therein. Order 14A is accordingly not apt for determining a question which involves a question of fact.

[20] In this respect, I hold that the application by the fourth defendant is inappropriate and on this ground alone this application ought to be dismissed.

[21] The power of the court to decide summarily under O 14A is a discretionary one and it ought to be exercised only in suitable cases. The court must also be satisfied that such determination will finally determine the entire cause or matter or any claim or issue therein. Having gone through the arduous task of scrutinising the pleadings and the affidavits filed in support and in opposition of this application, I can only conclude that by answering the question of law posed by the fourth defendant, there cannot be a final determination of the entire cause or matter before this court. From the pleadings and the affidavit evidence adduced thus far, the determination of the question of law only involves the fourth defendant as a purchaser of the said land. What about the issues that arise between the plaintiff with the other defendants which involves serious allegation of conspiracies, collusion and fraud among the defendants. Seen in that light, again I am forced to come to the irresistible conclusion that this is certainly not a suitable case to be summarily determined under the O 14A procedure.

[22] It has been held that the judicious exercise of discretion by the court in respect of O 14A procedure must be seen in the light of O 18 r 19 and O 14 applications. There is a correlation between these procedures. This point is reinforced in the case of *Muhamad Zain bin Sidek v Suruhanjaya Perkhidmatan Awam Malaysia* [2002] MLJU 779 where Syed Ahmad Helmy JC observed that:

> ... It should be borne in mind that O 14A was introduced to cater for situation where points of law (and not facts) are fit for summary disposal ...
>
> The position of an application under O 14A is similar to that under O 14 in that it should be made only if the court thinks it is a plain case and ought not to go for trial ...

[23] As I have adjudged earlier in considering the application to strike out, this case is not a plain case which does not merit a full trial.

[24] Lastly, I shall advert to the fourth defendant's contention and reliance on the case of *Adorna Properties Sdn Bhd v Bonsoom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241. The fourth defendant steadfastly maintained that being a bona fide purchaser for value, they have a indefeasible title to the land. While I fully agree with the question of law posed by the fourth defendant, it must not be forgotten that the very essence of s 340 of the National Land Code is on the issue of fraud and forgery. Whether or not there exists fraud, misrepresentation, conspiracy and collusion remains a contested and triable issue in this case. A full trial is necessary to unravel this issue to determine whether the fourth defendant is indeed a bona fide purchaser and whether or not there was any fraud committed and by whom.

[25] Looking closely at the facts and history of the case, a lot of questions need to be asked and considered on the circumstances surrounding the purchase of the land by the fourth defendant. When the trustees first bought the land, there was financier and it was not bought by the Persatuan's own money. This financier was subsequently paid the money loaned to the Persatuan upon the sale of the land to the fourth defendant. It is also pertinent to note that the Persatuan purchased the land from Kinta Properties Sdn Bhd for RM2,300,000 and later sold it to the fourth defendants for RM2,099,950. The trust deed empowering the two trustees to act for the Persatuan was drawn up after the purchase of the land by the Persatuan and its subsequent sale to the fourth defendant was resolved through an EGM which was convened on date after the sale and purchase agreement with the fourth defendant was signed on 28 May 2003 and after the application for the court's sanction of the sale was filed on 29 May 2003. The first and second defendants who are the trustees are at odds on the issue of the propriety of the sale to the fourth defendant. They are taking different stands and are at loggerheads. Next, there is the further allegation of misrepresentation by the second defendant against the solicitor who acted for the trustees in applying for the court's sanction of the sale. And there is also the issue of the validity of the court order sanctioning the sale which is brought up by the second defendant who is now according to the fourth defendant, taking a collateral proceeding to nullify and set aside the said court order. I am of the considered view that these facts and circumstances are material and must be considered by the court in disposing the matter. This was the approach taken by the Court of Appeal in the case of *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136; [2007] 4 AMR 546. The fourth defendant's total reliance on the case of *Adorna Properties* needs further deliberation and its applicability to the present set of facts and circumstances may only be fully determined upon a full hearing.

[26] Having considered the above mentioned set of facts and

circumstances, I found that the fourth defendant's application for the adoption of the O 14A procedure is inappropriate and accordingly, encl 32 is also hereby dismissed with costs.

[27] When this court dismissed both encls 10 and 32, Mr Kengadharan, learned counsel of the second defendant stood up and asked for costs against the first, third and fourth defendants. This was objected to by learned counsel of the said defendants and a short argument ensued thereafter. I then adjourned the matter for all parties concerned to submit a written submission on the issue of whether the second defendant who is not directly involved in the two applications in both encls 10 and 32 but took part in the arguments and filed affidavit's in opposition thereto, is entitled to costs. To borrow the words of the first, third and fourth defendant's counsel, Mr R Kengadharan did so at his own peril. Parties were given until 28 December 2007 to submit their written submissions but until the date of this judgment is written, I have yet to receive any. For the record, it is understood that Mr R Kengadharan was arrested for being involved in the Hindraf Movement and is currently being detained under the Internal Security Act 1960. Hence, the issue of costs to the second defendant is still unresolved. Parties however are at liberty to address this issue at some other opportune moment in the course of the full hearing of this suit.

Applications dismissed with costs.

Reported by Ashgar Ali Ali Mohamed